MOTION FILED
APR 2 1992

NUMBERS 91-744 AND 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, AND THOMAS ALLEN, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioners and Cross-Respondents

versus

ROBERT P. CASEY, ALLAN S. NOONAN, AND ERNEST D. PREATE, JR., PERSONALLY AND IN THEIR OFFICIAL CAPACITIES,

Respondents and Cross-Petitioners

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

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The United States Justice Foundation hereby moves this Honorable Court to grant it leave to file a brief *amicus curiae* in support of judgment for the respondents and cross-petitioners in the above captioned action pursuant to Rule 37 of the Rules of this Court. There has been no consent by the parties to the filing of this brief.

The organization filing this brief is a public interest legal foundation receiving support from practicing attorneys throughout the United States. Its purpose is to provide legal counsel and support to individuals and organizations which are engaged, or may become engaged in, litigation involving the protection of constitutional rights or other matters of grave public concern. The United States Justice Foundation and the members of the Bar who are its members and directors feel that the case before the Court regarding the Pennsylvania statute involves serious constitutional questions which are of interest to the members of the United States Justice Foundation.

The members of the United States Justice Foundation and in particular the attorney preparing this brief *amicus curiae* have extensive experience in litigation throughout the United States involving issues similar to those before the Court in the instant case and believe that the brief *amicus curiae* filed herein can assist the Court in making its decision.

Mover wishes to address itself in this brief not only to the questions raised by the challenge to the Pennsylvania law but also to the broader question of whether or not the decision of *Roe v. Wade*, 410 U.S. 113 (1973) should be reversed and a constitutional protection for the right to life of unborn citizens of the United States from the date of conception should be found to exist in the Constitution and laws of the United States.

Mover has a strong interest in and knowledge of the important issues raised here. Submission of mover's brief *amicus curiae* will be of substantial assistance to the Court, will not delay resolution of any of the issues raised in this case and will in no way prejudice the rights of any of the parties to this suit.

CONCLUSION

For the above stated reasons the United States Justice Foundation herein requests that this Court grant its motion for leave to file the accompanying brief *amicus curiae* in the present case in support of the position of the Respondents and Cross-petitioners.

Dated: April 2, 1992

RESPECTFULLY SUBMITTED:

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Respondents and Cross-Petitioners

NOTICE OF MOTION

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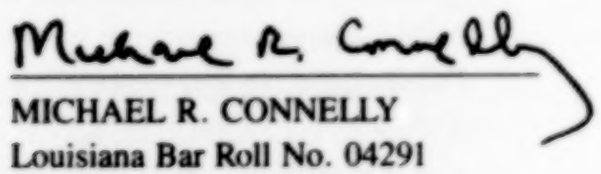
PLEASE TAKE NOTICE that the undersigned have moved the Court for leave to submit a brief *amicus curiae* on behalf of the United States Justice Foundation in support of judgment for respondents and cross-petitioners in the above captioned cause.

BY ATTORNEY:



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BRIEF *AMICUS CURIAE* ON BEHALF OF THE UNITED STATES JUSTICE FOUNDATION

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BRIEF OF *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The interest of *amicus* appears from the foregoing motion.

ARGUMENT

Introductory Statement

This brief addresses itself to two questions. First, whether the Pennsylvania law is constitutional under the current framework of the cases decided by this Honorable Court since the rendering of the judgment in *Roe v. Wade*, 410 U.S. 113 (1973) and secondly, whether the Court should at this time expressly overrule the decision of *Roe v. Wade*.

A. Summary of Argument

Amici contends that the decision of this Honorable Court in the case of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and holdings in subsequent cases has implicitly overruled or at least modified to a great extent the original decision in *Roe v. Wade*. This modification has provided States with the opportunity to regulate abortions within their borders by altering the original "strict scrutiny" language of *Roe v. Wade* to an analytical approach which seeks to determine if an "undue burden" is imposed on the alleged right to abortion and if no undue burden is found then the Court applies the rational basis test to reviewing the statutes in question.

This was a conclusion reached by the Court of Appeals in this matter and *Amici* joins with the State of Pennsylvania in contending that under this analytical approach the provisions of the Pennsylvania law are in fact constitutional.

Amici however seeks to go one step further and urges the Court in its argument to expressly reverse *Roe v. Wade* and even to go so far as to find that a constitutional right to life exists for unborn children from the moment of conception. This argument is based on the well-known and documented changes in medical technology which have occurred since the original *Roe v. Wade* decision and which have irrevocably altered not only the trimester concept of abortion but also the question of viability itself in favor of the unborn child.

B. Argument

Turning first to the question of the constitutionality of the Pennsylvania law now before the Court, *Amici* points out that this law is similar in approach to laws adopted by the States around the country and seeks not to outlaw abortion in all instances but to provide rational regulation of abortions and abortion clinics to an extent similar in many respects to the regulations placed on other medical procedures and medical practitioners. *Amici* specifically refers here to the informed consent provision of the law.

In recent years both federal courts and state courts around the country have broadened the requirements of informed consent to provide the patients who submit to a medical procedure which potentially threatens their life or well-being are fully apprised of the possible consequences of such a procedure. Abortion clinics have fought for years to maintain a virtual immunity from the provisions of informed consent which govern all other medical practitioners in the United States. It should also be pointed out that other provisions of the law such as the parental consent provisions and the various reporting requirements are similar in nature to requirements which govern virtually every other major medical procedure. With the exception of an emergency, which is provided

for in the statute, medical practitioners are not allowed to perform surgical procedures on minors without the consent of a parent or guardian.

Amici suggests to the Court that the fierce opposition to the various requirements cited above which have been cited in the brief filed by the plaintiffs in this matter are based not on concern for a woman's so-called right to abortion but on the interest of abortion providers and clinics in performing as many abortions as possible without having to overly burden themselves with concern for their patients' well-being.

In any case similar laws have been repeatedly held to be unconstitutional under the "strict scrutiny" approach adopted in *Roe v. Wade*, 410 U.S. 113 (1973). The Court of Appeals correctly concluded that this analytical approach had been abandoned by this Honorable Court in the recent decisions of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Hodgson v. Minnesota*, 648 F.Supp. 756 (D. Minn. 1986) and 110 S.Ct. 2926 (1990). It concluded instead that the court had adopted what was referred to as an "undue burden" standard and applied a rational basis test to the provisions of the Pennsylvania law. Using that test the Court of Appeals concluded that the majority of the provisions of the law were constitutional. The court basically stated that if no undue burden is shown to be placed on the woman's fundamental right to abortion by the law then the provisions of the law must be reviewed under the rational basis test. Plaintiffs object to the applying of either one or both of these approaches on the grounds that the "undue burden" test is vague and unworkable and that the "rational basis" test opens the door for states to regulate abortions to the point of denying a woman's right to an abortion.

Assuming that there is in fact a constitutional right to abortion, *Amici* again points out that the regulations contained in the Pennsylvania law are not unduly burdensome and meet the state's

compelling interest in protecting life. A life being protected by the state law is twofold, the regulations rationally provide the same safeguards for women seeking abortions as it provided for all other individuals who seek and receive medical treatment from health care providers and further the restrictions provide some protection for the life of the unborn child which *Amici* contends the state has a rational and compelling interest in protecting. The plaintiffs' approach that abortion clinics are somehow unique and should therefore be provided with a latitude that is not provided other health care providers despite the consequences to the patients can no longer be accepted. Abortion is a major medical procedure requiring anesthetic and the use of medical equipment in procedures which have the potential of causing death or great bodily harm to the patient. The later in the pregnancy that the abortion is performed the more likelihood exists that something could go wrong.

Not only is it not an undue burden to require such things as informed consent and parental consent for abortion procedures but it is irrational not to do so. *Amici* therefore contends that the Court should uphold the provisions of the Pennsylvania law as constitutional. Turning now to the second of *Amici's* arguments, the plaintiffs contend that the upholding of the decision of the Court of Appeals of this case would in effect overrule *Roe v. Wade* and deny women their constitutionally protected right to choose abortion. *Amici* contends that in fact the Court should overrule *Roe v. Wade* and find not only that there is not a constitutional right for a woman to choose abortion but also find that there is constitutional right to life of the unborn child from the point of conception.

Amici does not base this argument on religious contentions but on the provisions of the United States Constitution as enunciated in the Fourteenth Amendment.

The original decision of *Roe v. Wade* was based on the concept of viability of the unborn child and established the so-called trimester framework. Viability was described as:

> "That threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests existing from or paramount to, those of the pregnant woman."

The Court also referred to the fetus as being potential human life. While these definitions were couched in legal terms they were based to a great extent on the medical definitions of viability which existed at that time. Plaintiffs' arguments notwithstanding there have been rapid advances in medical technology within the last two decades which have significantly altered the concept of viability. *Amici* further contends that the idea of potential human life is no longer valid since it has been scientifically established that human life begins at conception and that the interference with the development of that human life by an outside agency such as a doctor performing an abortion is not terminating potential human life but terminating constitutionally protected life without due process of law.

Amici acknowledges the paramount importance of providing individuals within our society as much freedom of choice as is reasonably and rationally possible under the framework of our Constitution and laws. However, one individual's freedom to choose must be limited when it reaches the point of irrevocably denying someone else a fundamental right. There can be no more final denial of rights than by a woman choosing to have an abortion and terminate the life of an unborn child where that child has no right to choose on its own. The decision then is between a woman's so-called right to choose and a child's right to live.

The denial to a woman of the option to choose abortion and the termination of life does not irrevocably or permanently affect the quality of her life. There are other options available to abortion such as adoption. However there are no other options available to the child whose life has been terminated and it is on that basis that the competing interest should be weighed and the outcome in favor of protecting human life.

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that the provision of the Pennsylvania law be upheld as constitutional and that further the Court reverse the decision of *Roe v. Wade* in its entirety and find that the constitutional right to life outweighs the right of a woman to seek an abortion under all circumstances.

RESPECTFULLY SUBMITTED;

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Dated: April 2, 1992

CERTIFICATE

Undersigned counsel for the *Amicus Curiae*, United States Justice Foundation, does hereby certify that a copy of the above and foregoing

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

NOTICE OF MOTION

BRIEF OF *AMICUS CURIAE*

is being forwarded to the counsel of record by regular United States Mail, first-class postage prepaid, addressed as follows:

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